A

VINCENT RAJAMONY

v.

LEMBAGA RAYUAN KENAIKAN PANGKAT PERKHIDMATAN AWAM & ANOR

B

HIGH COURT MALAYA, SHAH ALAM
VERNON ONG J
[JUDICIAL REVIEW NO: 25-2-01-2013]
28 JANUARY 2014

C

ADMINISTRATIVE LAW: *Rights and liabilities of public servants - Termination - Conferment of rank of 'acting' Maritime Commander - Whether automatically entitled officer to promotion - Whether officer reverted to substantive rank upon termination - Whether termination*
D *amounted to demotion or reduction in rank - Whether decision on termination of officer justiciable - Public Services Promotion Board Regulations 1986, reg. 2*

WORDS & PHRASES: *'acting' - Public Services Promotion Board Regulations 1986, reg. 2 - Meaning of - Approval conferred on an officer*
E *so as to enable that officer to exercise duties of an officer of a higher grade - Subsequent phrase '... whether with a view to promotion or otherwise' - Whether denotes that conferment does not automatically entitle an officer to a promotion - Whether termination from 'acting' rank*
F *amounted to demotion*

The applicant was at all material time a public servant in the Malaysian Maritime Enforcement Agency ('MMEA') holding the rank of Acting Maritime Commander. Prior to his appointment in MMEA, the applicant was a commissioned officer in the Royal
G Malaysian Navy ('RMN') holding the rank of Acting Lt. Commander RMN. By a letter dated 18 April 2006, the applicant was offered the post and rank of Maritime Lieutenant in the MMEA which the applicant accepted and started his service with effect from 26 June 2006. Purusant to MMEA's letter dated
H 7 May 2008, the applicant was confirmed with the rank of Acting Maritime Commander with effect from 5 May 2008 and his performance would be subject to an appraisal for a period of not less than six months for consideration for promotion in rank. However, the Malaysian Armed Forces Headquarters informed
I MMEA that there was a mistake in the service folder of the

Malaysian Armed Forces whereby it was stated that the applicant's rank was Lt. Commander RMN when in fact it was actually Acting Lt. Commander RMN. MMEA therefore wrote to the Chief of RMN seeking RMN to consider confirming the applicant to the rank of Lt. Commander RMN. However, in its reply, RMN confirmed that the applicant had retired from the RMN with the rank of Lieutenant RMN and not Lt. Commander RMN. The applicant's appeal to the RMN Chief was also unsuccessful. Subsequently, MMEA informed the applicant that the Public Services Promotion Appeal Board ('first respondent') had, at its meeting, decided to terminate the applicant's rank of Acting Maritime Commander with effect from 1 August 2011 and accordingly, the applicant held the rank of Maritime Lt. Commander. The applicant's appeal to the first and second respondents was dismissed. In this application for judicial review against the first respondent and the Public Services Commission Board ('second respondent'), the applicant sought to quash the decision of the Chairman of the first respondent in dismissing his appeal. The principle issues for determination were: (i) whether the termination of the applicant's rank of Acting Maritime Commander was a demotion; and (ii) whether the decision of the first respondent justiciable; and if so, whether the respondents were under a duty to give reasons for their decision.

Held (dismissing application):

(1) Based on the definition of the word 'acting' in reg. 2 of the Public Services Promotion Board Regulations 1986 ('PSPB Regulations'), it can be inferred that an 'acting' rank is an approval conferred on an officer so as to enable that officer to exercise the duties of an officer of a higher grade. However, the ending phrase '... whether with a view to promotion or otherwise' denotes that such conferment does not automatically entitle an officer to a promotion. The interpretation was consistent with the fact that when the applicant was conferred the rank of Acting Maritime Commander with effect from 5 May 2008, it was also stated that his performance would be appraised for a period of not less than six months for consideration for promotion in rank. (paras 36 & 37)

(2) The termination of the applicant's rank of Acting Maritime Commander was not a demotion. Upon termination, the applicant reverted to his substantive rank of Maritime Lt. Commander. As such, the applicant did not suffer a reduction of rank. Since there was no element of demotion or reduction of rank, there was no punishment to complain of. (para 38)

(3) As an officer in the MMEA, the applicant was a public servant. The contractual relationship between a public servant and the Government is unlike that of an individual and a private employer. Upon being appointed to his post or office, a public servant's contractual status is no longer determined by consent of both parties. Instead, his rights and obligations are determined by statutes or administrative rules made by the Government. (paras 39 & 40)

(4) Even though the applicant was given the rank of Acting Maritime Commander 'with a view to promotion or otherwise', the applicant was never confirmed in the rank of Maritime Commander. The fact that he had completed or even exceeded the six months probationary period did not automatically entitle him to be promoted to the rank of Maritime Commander. Therefore, the applicant had automatically reverted to his substantive rank of Maritime Lt. Commander when his rank of Acting Maritime Commander was terminated. (paras 49 & 50)

(5) Under the PSPB Regulations, the Promotion Board regulates the rules pertaining to promotion whereas the appeals are heard by the first respondent. The question of whether to confirm the applicant's rank by promoting him to Maritime Commander is a management prerogative of the respondents. It is a matter of discretion. It is for the respondents to decide on whether the termination of the applicant's acting rank or his non-promotion is in the public interest. It was not for the courts to interfere or to inquire into the reasonableness of the termination of the applicant's acting rank. As the termination of the applicant's rank of Acting Maritime Commander was not a dismissal or reduction of rank, the decision in question was not justiciable. (paras 44-45 & 51-52)

Case(s) referred to:

Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor [2010] 3 CLJ 643 FC ***(refd)***

Anisminic Limited v. The Foreign Compensation Commission & Anor [1969] 1 All ER 208 ***(refd)***

Associated Provincial Picture Houses Limited v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC ***(refd)***

Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors [2006] 8 CLJ 114 HC ***(refd)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] 1 LNS 76 HC ***(refd)***

Express Newspapers Ltd v. Labour Court & Anor AIR 1964 SC 806 ***(refd)***

Gabongan Kesatuan Pekerja-pekerja Dalam Perkhidmatan-perkhidmatan Kerani Dan Bersekutu Kerajaan & Anor v. Ketua Pengarah Perkhidmatan Awam & Anor [1997] 1 LNS 251 HC ***(refd)***

Government Of Malaysia v. Rosalind Oh Lee Pek Inn [1973] 1 LNS 38 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

KC Mathews v. Kumpulan Guthrie Sdn Bhd [1981] CLJ 40B; [1981] CLJ (Rep) 62 FC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA ***(refd)***

Pengarah Pelajaran Wilayah Persekutuan & Ors v. Loot Ting Yee [1981] 1 LNS 186 FC ***(refd)***

Petroliam National Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Rasiah Munusamy v. Public Services Commission [1967] AC 348 ***(refd)***

Robert John Reeves v. Menteri Sumber Manusia Malaysia & Anor [2000] 1 CLJ 180 HC ***(refd)***

A *Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC* ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal [1988] 3 CLJ 85 CA ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
B

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Public Services Promotion Board Regulations 1986, reg. 2
Rules of Court 2012, O. 53 r. 2(2)
C Specific Relief Act 1950, s. 44

For the applicant - Muhammad Fairuz Abdul Yusof (Zalil Mohd Mess & Nur Afiqah Arisol with him); M/s Zalil Mohd & Partners
For the respondents - Aida Adha Abu Bakar; AG's Chambers

D *Reported by S Barathi*

JUDGMENT

E **Vernon Ong J:**

[1] In this application for judicial review, the applicant sought to *inter alia*, quash the decision of the chairman of the Public Services Promotion Appeal Board (first respondent) dismissing the
F applicant's appeal against the decision of the Public Services Promotion Board terminating the applicant's post of acting Maritime Commander in the Malaysian Maritime Enforcement Agency ('MMEA') with effect from 1 August 2011. The chairman of the first respondent is the chairman of the Public Services
G Commission (second respondent). After hearing of counsel of the parties, the court decided to dismiss the application. The grounds of the decision are as follows.

Brief Account Of The Salient Facts

H **[2]** The applicant was at all material times a public servant in the MMEA holding the rank of Acting Maritime Commander.

[3] Prior to his appointment in MMEA, the applicant was a commissioned officer in the Royal Malaysian Navy ('RMN')
I holding the rank of Acting Lt. Commander RMN.

[4] By a letter dated 18 April 2006, the applicant was offered the post and rank of Maritime Lieutenant Grade X 18 in the MMEA. The applicant accepted the said appointment. He started serving with the MMEA with effect from 26 June 2006.

[5] Meanwhile, by a letter dated 21 September 2006 the RMN confirmed that the applicant was holding the rank of Acting Lt. Commander RMN effective from 1 July 2005 and is eligible to be confirmed to the rank of Lt. Commander effective on 1 June 2006.

[6] By a letter dated 6 August 2007, the applicant was informed that his starting salary and rank had been revised from RM2,449.01 (P1 T8) Grade X 18 to RM2,772.86 (P1 T3) grade X 20 effective from 26 June 2006.

[7] Pursuant to MMEA's letter dated 7 May 2008, the applicant was confirmed with the rank of Acting Maritime Commander grade X 22 with effect from 5 May 2008. The applicant's performance would be subject to an appraisal for a period of not less than six months for consideration for promotion in rank.

[8] By a letter dated 6 January 2009, the Malaysian Armed Forces Headquarters (Markas Angkatan Tentera Malaysia) informed the MMEA that there was a mistake in the service folder of the Malaysian Armed Forces (BAT D 86) whereby it was stated that the applicant's rank was Lt. Commander RMN when in fact it was actually Acting Lt. Commander RMN. The applicant had not been confirmed in that rank prior to his appointment in the MMEA.

[9] On 4 March 2009, the MMEA wrote to the chief of the RMN asking the RMN to consider confirming the applicant to the rank of Lt. Commander RMN.

[10] In its reply dated 8 July 2009, the assistant chief of staff human resources RMN stated that the higher authority in the RMN had decided rectify the mistake of the rank to BAT D 86 and to confirm that the applicant had retired from the RMN with the rank of Lieutenant RMN and not Lt. Commander RMN.

[11] The applicant wrote an appeal letter dated 30 June 2010 to the chief of the RMN to confirm his acting rank of Lt. Commander RMN.

[12] By its letter dated 20 October 2013, the RMN informed that its decision was final and that no further appeal would be entertained.

[13] On 9 August 2011, the applicant received a letter dated 4 August 2011 from the MMEA. The applicant was informed that the first respondent had at its meeting on 29 July 2011 decided to terminate the applicant's rank of acting Maritime Commander effective from 1 August 2011.

[14] Accordingly, effective from 1 August 2011, the applicant held the rank of Maritime Lt. Commander.

[15] On 24 August 2011, the applicant submitted an appeal to the first and second respondents against the decision of the public services promotion board.

[16] By a letter dated 16 August 2012, the applicant was informed that at a meeting on 30 July 2012 the public services promotion appeal board had decided to dismiss the applicant's appeal.

Judicial Review In Malaysia

[17] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; [2011] 6 MLJ 507).

[18] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para. 1 of the Schedule to s. 25(2) CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any

others, for the enforcement of the rights conferred by Part II of the Constitution. In fact, an application for judicial review may include a prayer for a declaration (O. 53 r. 2(2) ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for *mandamus*, prohibition or *certiorari*. An order of *certiorari* has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any *ultra vires* exercise of powers. An order of *mandamus* is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s. 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

Distinction Between Public Law Proceedings And Private Law Proceedings

[19] Underlying the distinct nature of an application for judicial review is the requirement in Malaysian common law to have regard to the interest of good administration. In order to appreciate this concept, it is essential to draw a distinction between public law proceedings and private law proceedings.

[20] In private law proceedings, it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome. Be that as it may, the public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another.

[21] In contrast, public law proceedings usually affect many members of the public or even the public at large as well as the parties to the proceedings (eg, decisions of public bodies concerning Orang Asli native land rights, environment issues, planning permission, public nuisance, etc). Other members of the public will be interested to a lesser extent, whether financial or otherwise. However, there are also public law proceedings which do not usually affect the members of the public. A common example of this involves a person's application to quash the decision of the Industrial Court dismissing his claim for

reinstatement on the ground of unlawful dismissal. In these cases, the court will be largely, if not exclusively, concerned with the merits of the application alone. Both sets of proceedings are treated as public law proceedings because the decision is taken by a public body performing a public duty. Typically, the public bodies qua respondents in an application for JR would be the Ministry of Human Resource, Minister of Home Affairs, Registrar of Societies, State Executive Council, Registrar of Land and Mines, BURSA Malaysia, Securities Commission, Government departments (such as Immigration, Royal Customs, Royal Malaysian Police), tribunals (such as Housing Tribunal, Consumer Claims Tribunal), statutory bodies (Malaysian Medical Council, Lembaga Akitek Malaysia), Service Commissions, Director General of Inland Revenue, Majlis Agama Islam and the Appeal Board constituted under the Town and Country Planning Act 1976, to name a few.

[22] As a general rule, the court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

[23] Judicial review is therefore primarily concerned with enforcing public duties on behalf of the public as a whole. In this sense, the court's concern with vindicating the interests of the individual is part of the process of ensuring that public bodies do not act unlawfully and that they do perform their public duties.

Principles Of Judicial Review

[24] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305). The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of *certiorari* where (i) that body has acted without jurisdiction; or (ii) that body has exceeded its jurisdiction;

or (iii) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (iv) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether *certiorari* will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made *ultra vires*, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied with regard to the principles enunciated by the Court of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501 at p. 525; [2006] 3 MLJ 493 CA at p. 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, *inter alia*, in the forefront of his mind:
>
> (i) **judicial review is not an appeal from a decision but a review of the matter in which the decision was made**;
>
> (ii) **the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;**
>
> (iii) **the High Court through judicial review, should not introduce technicalities of the court of law** to the Industrial Court; this would certainly be so as s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (iv) the main and only function of the Industrial Court in dealing with a reference under s. 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.
>
> (v) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law*;

A (vi) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.* (emphasis added)

[25] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v. Arokianathan Sivapiragasam*, (*supra*), in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(i) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(ii) the merits where the decision is grounded on illegality or plain irrationality;

(iii) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(iv) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[26] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789; *Petroliam National Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288).

[27] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(1) Procedural Impropriety;

(2) Illegality; and

(3) Irrationality.

Procedural Impropriety

[28] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] MLJ 69; *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor & Another Appeal* [1988] 3 CLJ 85; *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390).

Illegality

[29] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and *Anisminic* error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* (*supra*)). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by *mala fide*. The

decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister Of Labour & The Government Of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481; *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 AMR 2265).

[30] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (*Anisminic Limited v. The Foreign Compensation Commission & Anor* [1969] 1 All ER 208, 213-214).

Irrationality

[31] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (the 'illegality' test), nor whether the decision was procedurally unfair (the 'procedural propriety' test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[32] A decision which falls on this ground is said to have failed the '*Wednesbury* unreasonableness' test (See *Associated Provincial Picture Houses Limited v. Wednesbury Corp* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of 'proportionality' (*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v. Zaid Mohd Noh* [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*, (*supra*)).

Decision Of The Court

[33] In this instance, the background facts serves to provide an insight into the circumstances under which the applicant, then a serving officer in the RMN came to be appointed as an officer in the MMEA.

[34] However, in this application for judicial review the impugned decision relates to the applicant's appeal against the termination of his rank of Acting Maritime Commander. Accordingly, the principal issues for determination are:

(i) whether the termination of the applicant's rank of Acting Maritime Commander is a demotion?;

(ii) whether the decision of the first respondent is justiciable?; and if so, whether the respondents are under a duty to give reasons for their decision.

Whether The Termination Of The Applicant's Rank Of Acting Maritime Commander Is A Demotion?

[35] As a starting point, it is pertinent to consider whether there is any distinction between an 'acting' rank and a 'substantive' rank.

[36] The word 'acting' is defined in reg. 2 of the Public Services Promotion Board Regulations 1986 ('PSPB Regulations') as follows:

> "acting" means where an approval is granted to an officer to exercise full time the duties attaching to the post of a higher grade than his substantive grade within the relevant Scheme of Service of the officer concerned whether with a view to promotion or otherwise ...

[37] Going by this definition, it can be inferred that an 'acting' rank is an approval conferred on an officer so as to enable that officer to exercise the duties of an officer of a higher grade. However, the ending phrase: "... whether with a view to promotion or otherwise" denotes that such conferment does not automatically entitle an officer to promotion. The qualifying words "with a view to promotion" mean that the 'acting' rank carries with it a view of promotion. This interpretation is consistent with

A the fact that when the applicant was conferred the rank of Acting Maritime Commander with effect from 5 May 2008, it was also stated that his performance would be appraised for a period of not less than six months for consideration for promotion in rank. It is therefore clear that the conferment of the rank of 'acting' B does not necessarily entail the automatic promotion of the officer to the post of a higher grade than his substantive rank. At most, the applicant was entitled to be considered for promotion during the period of appraisal.

C **[38]** For the foregoing reasons, the court finds that the termination of the applicant's rank of Acting Maritime Commander is not a demotion. Upon such termination, the applicant reverted to his substantive rank of Maritime Lt. Commander. As such, the applicant did not suffer a reduction of rank. Since there is no D element of demotion or reduction of rank, there is no punishment to complain of. The significance of this finding will become clear when the following issue is considered.

Whether The Decision Of The First Respondent Is Justiciable? If So, E *Whether The Respondents Are Under A Duty To Give Reasons For Their Decision*

[39] All employment relationships are contractual in nature. As an officer in the MMEA, the applicant is a public servant. The contractual status of a private individual and his employer is F governed by the consent of both parties as evidenced in his employment contract, the Employment Act 1955 and other relevant laws relating to employment matters. However, the contractual relationship between a public servant and the government is unlike that of an individual and a private employer.

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[40] Upon being appointed to his post or office, a public servant's contractual status are no longer determined by consent of both parties. Instead, his rights and obligations are determined by statutes or administrative rules made by the government. Every H public servant is required to comply with any circular and rules issued by the government from time to time (*Government Of Malaysia v. Rosalind Oh Lee Pek Inn* [1973] 1 LNS 38; [1973] 1 MLJ 222; *Abdul Aziz Mohd Alias v. Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 3 CLJ 643).

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[41] In *Pengarah Pelajaran Wilayah Persekutuan & Ors v. Loot Ting Yee* [1981] 1 LNS 186; [1982] 1 MLJ 68, the Federal Court reiterated that the law relating to civil service in Malaysia is based upon a twin principle that every employee holds office during pleasure of the Yang di-Pertuan Agong and that the qualifications for appointment and conditions of service are regulated by him, in addition and subject to any law on the same subject matters having been made by Parliament. The constitution prescribes no limit on the scope and extent of the pleasure of the Yang di-Pertuan Agong. However, the constitution prescribes procedural restrictions as to the manner and by whom the power of dismissal or reduction in rank is to be exercised. In that case, *Loot Ting Yee* was informed that he had been transferred from a school in Kuala Lumpur to a school in Terengganu. He appealed to the Minister of Education, who confirmed the transfer. He then applied for a declaration that the transfer was inoperative and void. Speaking for the Federal Court, Salleh Abas FJ (as he then was) said at p. 70:

> As to the allegation that the transfer was not in the public interest it suffices us to say that as employment in the civil service is during pleasure of the Yang di-Pertuan Agong, as long as he is in the service, it is for the Government to decide whether his transfer is in the public interest or not, having regard to the fact that the Government has a larger public duty to perform. It is not for us to interfere with the discretion of the Government in this matter. To do so would only amount to an unjustifiable usurpation of Government's discretion by us. There is absolutely no legal basis for us to interfere with the Government's discretion.
>
> Similarly the reasonableness of the respondent's transfer is not for us to decide. As regards punishment there is nothing in the Constitution which entitles an officer to bring his grievances before the court whenever he is punished **unless and until the punishment complained of amounts to a dismissal or reduction in rank**. No matter how aggrieved an officer is by the "punishment" in our view he has no cause of action. ... (emphasis added)

[42] It is not disputed that at all material times the applicant was holding the substantive rank of Maritime Lt. Commander. He was conferred the rank of Acting Maritime Commander with effect from 5 May 2008 and paid the acting allowance. The termination of his rank of Acting Maritime Commander was not a punishment in that it was not a dismissal, demotion or a reduction in rank.

[43] The applicant being dissatisfied with the aforesaid termination appealed to the public services promotion appeal board.

[44] Under the PSPB Regulations, the promotion board may shortlist candidates in any promotion exercise (reg. 12). A promotion board may, at its discretion, promote a reserved candidate in a promotion exercise (reg. 14). Further, it is also provided that the decision of the promotion board shall be provisional and is not confirmed until all the appeals in respect of a promotion exercise have been determined (reg. 15).

[45] Appeals are heard by the public services promotion appeal board (appeal board). The PSPB Regulations set out the procedure relating to the hearing of appeals. It is also provided that the decision of the appeal board is final (reg. 22).

[46] Learned Senior Federal Counsel submitted that any decision made by the promotion board shall only be appealable to the appeal board and that the decision of the appeal board is final. The issue as to whether a public service officer can be confirmed or promoted is a non-justiciable issue since it is a management prerogative of the promotion board and the appeal board under the PSPB Regulations (*Gabongan Kesatuan Pekerja-pekerja Dalam Perkhidmatan-perkhidmatan Kerani Dan Bersekutu Kerajaan & Anor v. Ketua Pengarah Perkhidmatan Awam & Anor* [1997] 1 LNS 251; [1998] 5 MLJ 209; *Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors* [2006] 8 CLJ 114; [2007] 2 MLJ 761).

[47] In *Rasiah Munusamy v. Public Services Commission* [1967] AC 348 PC, the appellant who was previously an immigration officer was appointed assistant passport officer in the external affairs services. Under the terms of his appointment, he was put under a one year probationary period. Later, when it was discovered that the appellant had made a false declaration, the appellant's appointment was terminated and he was reverted to his former post without giving him the opportunity of being heard. He applied for an order of *certiorari* to quash the commission's decision on the ground that under the constitution his employment could not be terminated without giving him the opportunity of being heard. The High Court dismissed the application; the Federal Court upheld the High Court's decision. At p. 360, Lord Hodson speaking for the Privy Council said:

> The letter of appointment is not wholly clear in its terms but their Lordships are of opinion that the appellant was in any event appointed to the rank of assistant passport officer only as a probationer, **so that he could be reverted to his substantive rank of immigration officer without the question of reduction of rank arising for consideration** notwithstanding the statement in the letter that subject to his work and conduct being satisfactory he would be eligible for confirmation in his appointment at the end of the period. "Eligible for" is not equivalent to "entitled to: and means no more than "fit to be chosen for." (emphasis added)

[48] In *Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] 1 LNS 76; [1989] 3 MLJ 298. *Dr Amir* was appointed dean of the School of Social Science for the period from 1 December 1984 to 31 May 1985. Thereafter he was reappointed for two consecutive one-year terms ending on 31 May 1989. On 3 May 1989, the vice-chancellor issued a letter indicating his decision not to reappoint Dr Amir. Dr Amir then applied to court for leave to apply for a *certiorari* to quash the decision of the vice-chancellor. The application for leave was dismissed. Edgar Joseph Jr J (as he then was) said at p. 300:

> The more difficult question was whether it was arguable that the applicant had a legitimate expectation of being reappointed dean. If so, it would be arguable that he should have been given the opportunity of making representations (see *Schmidt v. Secretary of State for Home Affairs* at p. 170 and *Attorney General of Hong Kong v. Ng Yuen Shiu*).
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> However, to qualify as an expectation which attracts procedural protection, it must be 'legitimate'. The closest the courts have come to explaining the idea of legitimacy is that the expectation must be reasonable. The epithet most frequently used by the courts as a substitute for 'legitimate' is 'reasonable' (see *AG of Hong Kong v. Ng Yuen Shiu* at p. 637), although reference has also been made to 'well founded' (*Salemi v. MacKellar (No. 2)* at p. 439 per Stephen J), 'settled' (*R v. Liverpool Corporation; ex p Liverpool Taxi Fleet Operators' Association* at p. 304 per Denning MR), 'natural' (*FAI Insurances Ltd v. Winneke* at p. 348 per Gibbs CJ) or 'real' (*Barbaro v. Minister for Immigration and Ethnic Affairs* at p. 130 per Smitthers J).

A 'Reasonableness' connotes that the expectation must be objectively justified. A subjective hope is therefore not enough (see *McInnes v. Onslow-Fane* at pp. 1529-30). However, its use has been discouraged recently by the House of Lords (see *Council of Civil Service Unions v. Minister for the Civil Service per Lord Fraser, Lord Diplock and Lord Roskill*). The chief reason advanced being that
B some expectations, although they might well be entertained by reasonable persons will not necessarily have consequences to which effect will be given in public law (at pp. 408-409 per Lord Diplock). Furthermore, the possibility that there may be some reasonable expectation which are not 'legitimate' has emerged with
C the extension of concept of legitimate expectation into areas other than procedural fairness; for example, standing to bring an application for judicial review (see *Re Findlay*, a case on parole policy).

D Now, in the area of employment, the concept of legitimate expectation is elusive at lease where used in relation to the expectation of promotion (see *Hamblin v. Duffy (No. 2)* at p. 304). Indeed, it has been held that the decision of a health authority not to appoint to the post of consultant orthopaedic surgeon a candidate recommended by the advisory appointment
E committee was not justiciable at all and so not susceptible of judicial review (see *R v. Trent Regional Health Authority, ex p Jones*).

[49] Learned counsel had argued that since the applicant had served the six months probationary period, he was fit to be confirmed. With respect, this argument is untenable because even
F though the applicant was given the rank of Acting Maritime Commander 'with a view to promotion or otherwise', the applicant was never confirmed in the rank of Maritime Commander; the fact that he had completed or even exceeded the six month probationary period does not automatically entitle him to be promoted to the
G rank of Maritime Commander. In *Robert John Reeves v. Menteri Sumber Manusia Malaysia & Anor* [2000] 1 CLJ 180; [2000] 1 MLJ 107 the applicant was appointed as a senior manager with effect from 30 January 1997. His appointment was subject to a probationary period of six months. On 2 September 1997, he was
H informed by his employer that based on the overall assessment of his job performance, they were unable to confirm his appointment upon the expiration of the six months probationary period. His appointment was therefore terminated with effect from 3 September 1997. The High Court cited with approval the Federal Court
I decision of *KC Mathews v. Kumpulan Guthrie Sdn Bhd* [1981] CLJ

40B; [1981] CLJ (Rep) 62; [1981] 2 MLJ 320 at p. 321 which confirmed the position of probationers, as set out in the Indian Supreme Court case of *Express Newspapers Ltd v. Labour Court & Anor* AIR 1964 SC 806 where Das Gupta J held:

> This contention is, in our opinion, wholly unsound. There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had either not been terminated or he is confirmed. It appears clear to us that without anything more an appointment on probation for six months gives the employer no right to terminate the service of an employee before six months had expired - except on the ground of misconduct or other sufficient reasons in which case even the services of a permanent employee could be terminated. At the end of the six months period the employer can either confirm him or terminate his services, because his service is found unsatisfactory. If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in the service as a probationer.

[50] Since the applicant's rank of Acting Maritime Commander was terminated, he had automatically reverted to his substantive rank of Maritime Lt. Commander.

[51] The applicant's assertion that he ought to be accorded that rank is akin to him being promoted to Maritime Commander which is a post of higher grade than his substantive rank of Maritime Lt. Commander. Ultimately, the question of whether to confirm the applicant's rank by promoting him to Maritime Commander is a management prerogative of the respondents. It is a matter of discretion. It is for the respondents to decide on whether the termination of the applicant's acting rank or his non-promotion is in the public interest. It is not for the courts to interfere or to inquire into the reasonableness of the termination of the applicant's acting rank.

[52] In closing, as the termination of the applicant's rank of Acting Maritime Commander is not a dismissal or reduction of rank, the decision in question is not justiciable. In consequence, the application was dismissed.